No. 09-

In the
Supreme Court of the United States

Mark Cimini – Petitioner

vs.

Margaret Cimini - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
MASSACHUSETTS
APPEALS COURT FOR THE COMMONWEALTH

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented:

1. Divorce prior to 1785 was heard by the Governor and his Council. Between 1785 and 1824 divorce was exclusively heard under the criminal jurisdiction of the Massachusetts Supreme Judicial Court. The question for this court is:

    a. Whether the conversion from a criminal matter to a civil matter should have preserved the right to a trial by jury under the Sixth Amendment and Article XV of the state constitution.

2. Two standing precedents from this court state that custody can only be adjudicated under Common Law jurisdiction, that it is a violation of Due Process to adjudicate in any other jurisdiction. Massachusetts case law also shows that custody and divorce was determined under Common Law jurisdiction. Thus the questions for this court are:

    a. The contradiction between this court's standing precedents regarding adjudication of custody or *parens patriæ* under Common Law jurisdiction and modern state case law which prohibits adjudication under Common Law jurisdiction?

    b. Does the difference between "Best Interest" hearings under Common Law jurisdiction versus Equity jurisdiction violate multiple Constitutional

provisions to include the Eighth, Ninth and Thirteenth Amendment?

3. Under the Common Law, the state or plaintiff had to show a criminal act occurred to justify interference in family life. The proven criminal act was punished in criminal and civil proceedings, i.e., remedy for injury, not relative standing based on judicial discretion. Thus the questions for this court are:

    a. Has the shift in the burden of proof and in burden of persuasion violated Due Process when changing the jurisdiction of these matters?

    b. Has the Eighth, Ninth, Tenth, and Thirteenth Amendment been violated in this change of jurisdiction?

4. Prior to Statutes 1953, c. 505, the Common Law rule prohibited imposing child support, criminally or civilly, without showing harm to a child. Civil disputes regarding child support always required a trial by jury. Child support between unmarried couples required a trial by jury under criminal statutes. Prior to statutes regarding child support, providing necessities always required a trial by jury. The questions for this court are:

    a. Has the state unlawfully preempted the right to a trial by jury in a civil dispute of child support?

    b. Can the state impose the punishment of child support without any proof of harm in violation of the Eighth Amendment?

c. Can the state alter the Common Law protections against unwarranted state intrusion in violation of the Ninth and Tenth Amendments?

5. The Massachusetts judiciary role in establishing the child support formula, adjudicates child support awards, and derives an independent revenue stream under Title IV from the collection of child support. The question for this court is:

    a. Given the judicial involvement in establishing, adjudicating, and profiting from child support awards, are people denied fair and impartial hearings?

6. Given the history of natural right adjudication of custody, changes to adjudication, and current historical data which shows that one gender has been disenfranchised from their children and subject to punishment without proven wrongdoing. The question for this court is:

    a. Is there a pattern of Invidious Gender Discrimination in changes to custody adjudication?

Parties to the Proceedings:

Mark Cimini, Petitioner, and Margaret Cimini, Respondent. Respondent was represented by Attorney Gerald Venezia in the state court proceedings.

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Petition for the Writ of Certiorari:

Petitioner Mark Cimini respectfully petitions for a writ of certiorari to review the judgment of the state courts which contradicts federal laws, including two standing precedents of this court, brings into question the impartiality of the state court system, and bars consideration of any and all federal issues in Family Law matters.

In direct conflict of the requirements of the Constitutions of the United States[1] and two standing orders from this court[2], Massachusetts adjudicates custody, child support, and divorce under equity jurisdiction.

The state judiciary's role in establishing the child support guidelines, adjudicating child support, and deriving an independent revenue stream from child support awards calls into question the impartiality of the state courts.

Additionally the state imposes harsher punishment without identified wrongdoing under 'equity' jurisdiction that was ever imposed under Criminal or Common Law jurisdiction for criminal actions proven in a court of law. As a result the state courts have deprived the petitioner of at least the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Thirteenth, and Fourteenth Amendment as well as Liberty Interest and Happiness.

Opinions Below:

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[1] *Marbury v. Madison*, 5 US 137 (1803) "[A] law repugnant to the Constitution is void, ..."

[2] *Mercein v. Barry*, 46 US 103 (1847) and *In re Burrus*, 136 US 586 (1890)

The trial court opinion of the Middlesex Probate and Family Court (hereafter P&F Court), Massachusetts Appeal Court (hereafter Appeals Court, unpublished case number 73 MA 1112 (2009)), motion for rehearing denied January 21, 2009, and the rejection of the request for Further Appellate Review (hereafter FAR, unpublished case number 453 MA 1104 (2009)) by the Massachusetts Supreme Judicial Court (hereafter SJC) without comment[3]. All of the issues presented herein were presented to each of the state courts. The P&F Court stated it only dealt with "the statutory construction of the laws" and the Appeals Court stated its legislative construction prohibited it from any rulings contrary to an SJC ruling. The FAR dismissal was rendered 25 February 2009 leaving this conflict unaddressed in the Massachusetts courts.

Although the Appeals court noted that the Plaintiff's challenge was regarding the jurisdiction of the P&F court, an equity court, to determine these matters (see Appendix B "His claims challenge jurisdiction and assert violations of constitutionally based rights and guarantees, including in particular a claimed right to trial by jury.") did not address any of the changes to Family Law identified in the petitioner's pleadings or the contradiction with this court's standing rulings; the Appeals Court clearly stated that it is prohibited from making any determination contrary to an SJC ruling, regardless of any apparent conflict with the federal Constitution or this court's standing precedents. In particular the Appeals Court failed to address that this court has

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[3] Complete history available on line at http://www.ma-appellatecourts.org/display_docket.php?dno=2007-P-1836

twice ruled that custody determinations require Common Law jurisdiction, see *Mercein v. Barry*, 46 US 103 (1847) and *In re Burrus*, 136 US 586 (1890), whereas adjudicating *parens patriæ* being a Due Process violation in any other jurisdiction.

The state has very cleverly ignored key case law and changes in statutes to avoid the appearance of ignoring federal issues in its modern statutory construction of Family Law, specifically:

1. The changes in jurisdiction, both the:
   a) Contradiction between this court's two standing precedents which state that custody can only be determined under Common Law jurisdiction and the SJC stating that custody can be determined under equity jurisdiction.
   b) The implication that divorce was a criminal matter between 1785 and 1836 with the Sixth Amendment protections ignored in the state courts.
2. The question regarding fair and impartial courts given the role of the courts in determining the child support formula, adjudicating child support, and deriving an independent revenue stream based on child support,
3. Whether the changes identified in family law since the signing of the federal Constitution meet strict scrutiny requirements,
4. The effect of shifting the burden of proof and burden of persuasion in imposing punishment based on judicial discretion, not identified and proven harm and the resultant impact on Constitutional and natural rights.

The Appeals Court clearly stated (See Appendix B - "from the very earliest decisions we issued and continuing to this day, we have uniformly and unequivocally held we have no power to alter, overrule or decline to follow the holding of cases the Supreme Judicial Court has decided.") it is barred from determining federal issues presented hence rendering its decision in this matter void.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED
United States Constitution

Fourth Amendment, pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and ..."

Fifth Amendment, pertinent part, "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

Seventh Amendment, pertinent part, In Suits at common law, ... the right of trial by jury shall be preserved, ...

Eighth Amendment, pertinent part, "... nor cruel and unusual punishments inflicted."

Ninth Amendment, reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment, reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thirteenth Amendment, Section 1, reads "Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Fourteenth Amendment, Section 1, pertinent part, "... nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the Commonwealth of Massachusetts:

Declaration of Rights, Article XV, reads, "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

Declaration of Rights, Article XXIX, pertinent part, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free,

impartial and independent as the lot of humanity will admit."

Statutes Involved:
Federal Statutes

28 U.S.C. §1257(a). Jurisdiction and venue: State courts; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Massachusetts Statutes

Statutes 1692-3, Chapter 18: An Act For the Punishment of Criminal Offenders
Fornication [Sect. 5] [pertinent part]
That if any man commit fornication with any single woman, upon due conviction thereof they shall be fined unto their majesties not exceeding the sum of five pounds, and be corporally punished by whipping, not exceeding ten stripes apiece, at the discretion of the sessions of the peace who shall have cognizance of the offence.

Statutes 1785, Chapter 69, Provided always, That no decree of divorce for or on the account of adultery shall bar the issue of such marriage from inheriting, but the decision of the right of such child or children

to inherit shall be tried and settled upon the principles of common law, in the same manner as though this act had never been made.

Statutes 1835, Chapter 76, Section 20, "A divorce for the cause of adultery, committed by the wife, shall not affect the legitimacy of the issue of the marriage, but the legitimacy of the children, if questioned, shall be tried and determined according to the course of common law."

Statutes 1838, CHAP. CXXVI, An Act relating to Divorce.
BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the, same, as follows:
SEC. 1. A divorce from the band of matrimony may be decreed, in favor of either party, whom the other shall have wilfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted.
SEC. 2. When a divorce is decreed for the cause of desertion by the husband as aforesaid, the same proceedings shall be had, touching the estate of the wife or the alimony to be allowed her, as in the case of divorce on account of the husband's being sentenced to confinement to hard labor, or from bed and board.

Statutes 1860, Chapter 107, Section 13, [pertinent part] "Libels for divorce shall be heard and determined in the supreme judicial court held for the county in which, or for two or more counties in either of which, the parties or one of them live. When heard before a single judge, either party may take exceptions in the same manner and with the same effect as in suits at common law."

Statutes 1882, Chapter 146, sect. 12. [pertinent part] When the libel is filed in vacation in the office of the clerk of the court, such attachment may be made upon the summons issued thereon, in the same manner as attachments are made upon writs in actions at common law

Statutes 1913, Chap. 563 [pertinent part]
An Act Relative To Illegitimate Children And Their Maintenance.
Be it enacted, etc., as follows:
Courts having jurisdiction of complaints in cases of maintenance, etc., of illegitimate children.
SECTION 1. Whoever, not being the husband of a woman, gets her with child shall be guilty of a misdemeanor.

Statutes (Acts) 1953, Chapter 505
AN ACT RELATIVE TO THE SUPPORT OF MINOR CHILDREN BY THEIR PARENTS.
Be it enacted, etc., as follows:
Section 8 of chapter 273 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following sentence: —— The legal duty of the parent or parents to support a minor child shall continue, notwithstanding the absence of a court decree ordering them or either of them to pay for the support of said child shall continue notwithstanding any court decree granting custody of such child to another; provided, however, that where decree stipulates an amount to be paid by them or either of them for said child's support they shall not be obligated in excess of that amount.

Statement of the Case:

This petition arises out of the fact that there is a clear contradiction between rulings from this court and laws of Massachusetts and that all federal issues and questioned raised in the Massachusetts state courts are barred from a full and proper hearing because of the SJC's interpretation of Article XV of the Massachusetts Constitution. The Petitioner raised several federal Constitutional issues regarding conflict with this court's standing rulings and the substantial changes in the adjudication of divorce, custody, and child support (hereafter Family Law) during the lengthy proceedings in the state court, including the fact that the SJC's interpretation of Article XV directly contradicts two standing precedents from this court which states that custody must be determined under Common Law jurisdiction, see *Mercein v. Barry*, 46 US 103 (1847) and *In re Burrus*, 136 US 586 (1890), and is a violation of Due Process to adjudicate custody under any other jurisdiction.

The P&F Courts stated outright that they do not deal with federal Constitutional issues and limit themselves to a "statutory construction of the laws." The fact that the P&F Court does not deal with federal issues and all of the federal issues were again presented to the Appeals Court.

The Appeals Court responded by confusing the issue with the determination and process of the P&F Court, not the conflict with this court's rulings or jurisdiction issue or federal issues. Additionally the Appeals Court noted that their construction precluded ruling contrary to SJC case law, regardless of any apparent contradictory federal

issues raised. The SJC, in denying the FAR, allowed the apparent conflict with federal issues and direct conflict with this court's ruling to be disregarded in favor of state precedents.

The state uses *Bigelow v. Bigelow*, 120 Mass. 320 (1876) to deny the right to a trial by jury but fails to address the changes to Family Law since that ruling or address the separate and distinct issue dealing with non-abandonment, non-neglect, non-abuse civil child support which always had the right to a civil trial by jury. Also, the state has never addressed the criminal adjudication of Family Law prior to 1836 in Massachusetts.

Reasons for Granting the Writ:

Fundamentally the state is imposing harsher punishments currently under equity jurisdiction than was previously imposed for criminal behavior under criminal and Common Law jurisdiction. This change from harm based adjudication under criminal and Common Law jurisdiction means that innocent people are subjected to horrific punishments without Due Process of law[4].

Divorce, child support, and custody determinations were punishments made because of an injury, a criminal breach of conduct, a violation of a natural law obligation, NOT state ideology, NOT judicial discretion, see *Lucas v. Lucas*, 69 Mass. 136 (1854) (divorce is a "...suit brought by one person against another to obtain redress for himself for an

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[4] *Worcester v. Georgia*, 31 U.S. 515; (1832), "It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment; if punishment could disgrace when inflicted on innocence."

injury done him."); *Miller v. Miller*, 150 Mass. 111 (1889) ("Because the deserter is a wrongdoer, the law gives the deserted party a right to a divorce.").

Some of the major changes to Family Law since the Governor and his Council adjudicated these matters include:

1. Conversion from criminal punishment to a civil dispute,
2. Conversion from a Common Law jurisdiction to equity,
3. Changing the Common Law rule that forbid imposing child support or 'necessities' under civil hearings unless harm to the child was proven.
4. Going from harm based adjudication to opinion based determination and punishment.
5. Punishing innocent people with harsher sanctions than in criminal and Common Law civil proceedings.

These changes to Family Law have not met the strict scrutiny requirements per this court's rulings and has devolved into imposing ideology backed with state police power and imposing punishment without wrongdoing, thus the claim of peonage.

Ankenbrandt v. Richards, 504 U.S. 689 (1992) questions the origin of federal abstentions regarding Family Law. *Barry v. Mercein*, 46 US 103 (1847); *In re Burrus*, 136 US 586 (1890), and *In re Barry*, 42 F. 113 (1844) conclusively show that the abstentions originate in the federal court's lack of Common Law jurisdiction, not comity, not federalism, jurisdiction. Additionally these three cases claim that state courts are better equipped to handle the subtle variations of the Common Law in the various states.

First Question

The state claims that since divorce was heard, prior to 1785, by the Governor and his Council all federal issues are void. The state has never addressed the criminal adjudication of these matters prior to 1838 nor the changes to Family Law with regard to federal issues.

Between 1785 and 1824 divorce was exclusively heard under the criminal jurisdiction of the SJC, see *Pidge v. Pidge*, 44 Mass. 257 (1841). Thus at the signing and ratification of the US Constitution Family Law was a criminal matter, see *Barber v. Root*, 10 MA 260 (1813) ("Regulations on the subject of marriage and divorce are rather parts of the criminal than of the civil, code; ...") and *Harvard v. Head*, *111 Mass. 209 (1872)*, ("Divorce proceedings are criminal in their nature, and the public is a party.), and thus is entitled to Sixth Amendment protections.

Additionally *Barber* states:

> "A divorce, for example, in a case of public scandal and reproach, is not a vindication of the contract of marriage, or a remedy to enforce it; but a species of punishment, which the public have placed in the hands of the injured party to inflict, under the sanction, and with the aid, of the competent tribunal, operating as a redress of the injury, when, the contract having been violated, the relation of the parties, and their continuance in the marriage state, has become intolerable or vexatious to them, and of evil example to others."

Arguably the Governor and his Council were imposing life-long, criminal punishments for criminal

actions by taking away multiple natural rights. These natural right included: the right to marry again, the natural right to have sex (since the right to have sex was tied to marriage), and the right to beget legitimate children. Also note that adultery was a capital offense under the Massachusetts Body of Liberties (1641). Arguably, given that the matter was transferred under the criminal jurisdiction of the SJC in 1785, additional weight to the argument that the Governor and his Council were in fact implementing a criminal, not civil, process and hence the interpretation of Article XV by the state is void.

There is no example in the public records of the Governor and his Council ever implementing a change of custody or imposing child support, see *Clarke v. Clarke*, Massachusetts Archives Collection, Vol. 009, Page 221-222 (1737), *Wharton v. Wharton*, Massachusetts Archives Collection, Vol. 009, Page 068 (1675)[5]. The Governor and his Council only implemented divorce when presented with a criminal conviction of adultery or some other crime. Freeing the innocent party of the constraints imposed on their personal liberties because of the criminal conduct of the other party was the object of the petitions, see *Clark* and *Wharton* above.

Even after the Governor and his Council adjudicated these matters, the courts also were concerned with freeing the innocent party of constraints on their personal liberties, see *Doole v. Doole*, 144 Mass. 278 (1887), ("...praying that the court would prohibit the husband from imposing any restraint on her personal liberty, ..."); *Bigelow v.*

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[5] Summaries available on-line at http://www.sec.state.ma.us/

Bigelow, 120 Mass. 320 (1876) ("... authorizes this court to prohibit the husband from restraining the personal liberty of the wife, ...").

In *Pidge v. Pidge*, 44 Mass. 257 (1841), the case which cites Statutes 1838, c. 126 as "great change is introduced, and a divorce from the bond of matrimony may be now decreed without any crime having been committed by the libellee", the right to a trial by jury is clearly stated regarding who, jury or judge, determines the facts of a divorce:

> "It was held by the whole court, in *Houliston v. Smyth*, 3 Bing. 127, that where the wife leaves the husband, under such an apprehension of personal violence, **as a jury shall deem to have been reasonable**, her husband is liable for necessaries for her support." [Emphasis added]. *Pidge v. Pidge*, 44 Mass. 257 (1841)

Hence the Common Law matter of divorce did have a trial by jury over the interpretation of the facts. This right has been preempted due to the modern misinterpretation of Article XV.

That means prior to Statutes 1838, c. 126 the SJC heard Family Law matters under its criminal jurisdiction, see *Barber v. Root*, 10 MA 260 (1813) ("Regulations on the subject of marriage and divorce are rather parts of the criminal, than of the civil, code; ...").

The conversion from a criminal matter to a civil matter should have 1) preserved the right to a trial by jury under the Sixth Amendment and 2) preserved the right to a trial by jury as a 'new' civil matter under Article XV.

Bigelow v. Bigelow, 120 Mass. 320 (1876) is a case of punishment of a father for the criminal abandonment of his wife and children. This is separate and distinct from the instant case, and most cases, since there has never been an accusation criminal behavior against the petitioner.

The changes since *Bigelow* include imposing child support without proving harm to the child and imposing child support under a purely civil hearing. *Bigelow*, was a case of state imposed punishment for abandonment. Its roots are in the criminal proceedings between 1785 and 1838. Imposing child support as a criminal punishment for abandonment per *Bigelow* versus imposing child support under an equity determination of relative parenting ability is a violation of Due Process because of the shift in the burden of proof and burden of persuasion.

Furthermore, *Bigelow* explicitly acknowledges that the matter is under Common Law jurisdiction. The plaintiff in *Bigelow* raised the issue of the Seventh Amendment right to a trial by jury. The court dismissed this issue, not by stating it was an equity matter but by stating, "The seventh article of amendment of the Constitution of the United States ... does not apply to the state courts."

The state in using *Bigelow* in modern 'no-fault divorce' is imposing the punishment once reserved for criminal behavior. In fact the state is imposing harsher punishment since under the Common Law only necessities were allowed[6]. Instead the state now requires a percentage of income without the

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[6] *Finch v. Finch*, 22 Conn. 411 (1853) provides an example bill for necessities at the appellate level

ability to challenge the necessities issue. Additionally the state's ability to impute or determine income means that a person's choice of how to earn a living is bounded by the state's expectations, i.e., imposing restraints on personal liberty, and hence there is a claim of violating the Thirteenth Amendment in these non-punishment proceedings.

Initially there were three separate and distinct types of child support:

1. Civil proceedings regarding providing necessities for a child had the right to a trial by jury.

2. Unmarried men were criminally responsible for providing support and had the right to a trial by jury (under Bastardly and Begetting statutes).

3. Married men abusing or abandoning their children, the state contends, never had the right to a trial by jury.

Point 1 above has already been shown above. Additionally there are cases such as:

> "The court instructed the jury, upon these facts, that, if he made no suitable support for the child at home, he was liable for that which its mother procured to be afforded by the plaintiff." *Reynolds v. Sweetser*, 81 MA 78 (1860)

Point 2 can be shown with multiple cases such as *Hill v. Wells*, 23 Mass 104, 106 (1828):

> "One other consideration fully confirms us in this construction. By St. 1800, c. 44, the Court of Sessions for the county of Suffolk was deprived of a jury. If therefore the jurisdiction was not

transferred in 1800 to the Municipal Court, but remained in the Sessions, the latter court was unable to execute the laws of bastardly, because, by the act, prosecutions under it were to be tried by jury; and the legislature had deprived the court in which alone they had vested the jurisdiction, of the means of trying the complaints in the only way in which by law they could be tried."

Historically, unmarried men did not pay the mother of the bastard child but instead posted a bond to the town, see Statutes 1692-3, c. 18, §5.

Regarding Point 3 above, child support as a punishment is a statutory construction of the laws[7]; thus, arguably, prior to the statutory construction of child support as punishment, the only mechanism for necessities for a child in cases of abuse or abandonment was a trial by jury. Thus, following the state's logic, once child support as a punishment became statutory these statutes unlawfully preempted the Common Law method of providing for necessities, i.e., trial by jury.

Such proceedings to collect child support could not be supported in England, see *Dennis v. Clark*, 56 MA 347 (1848) (doubting "whether such action could be maintained", i.e., child support hearings, in English courts).

Sanctions for abuse or abandonment meets this court's definition of punishment but what purpose does punishing one parent regardless of their actions? More on punishment versus remedial and ameliorating actions below.

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[7] *Brow v. Brightman*, 136 MA 187 (1884) and discussion regarding this case at 18 Cent. L.J. 469, 1884

Imposing on one gender, i.e., overwhelmingly men, an obligation, once imposed as punishment for criminal actions, meant to deter and ameliorate behavior, without the benefit of the reciprocal or corresponding rights under the Common Law is clearly a violation of the Eight Amendment. Additionally, it is part of a pattern of Invidious Gender Discrimination.

Article XV must be interpreted in conformance to the Sixth and Eighth Amendments, the right to a trial by jury for the civil dispute of divorce and child support, constraints on personal liberties, the Eighth Amendment, and the Due Process determinations made by this court. Additionally, this petitioner claims that there is a Due Process violation that occurred when converting from Common Law adjudication where harm had to be proven to one where there is no harm, only state ideology under the guise of equity determinations. Adjudicating once criminal matters under equity without a trial by jury and without any identified wrongdoing is a violation of the Sixth Amendment, Due Process, and the Common Law right to a trial by jury over the civil dispute of child support.

Second Questions

This court twice stated, relying on *In re Barry*, 42 F. Cas. 945 (1844), that it is a violation of Due Process to adjudicate custody under any jurisdiction but Common Law, see *Barry v. Mercein*, 46 US 103 (1847); *In re Burrus*, 136 US 586 (1890). Both of these case use *In re Barry*'s assertion that *parens partiæ* require Common Law jurisdiction. Another view of custody jurisdiction supporting this is *Ex Parte Barry*, 43 U.S. 65 (1844).

Specifically in *Burrus*:

"Judge Betts, who delivered a very careful and a very able opinion, which has been furnished to us, in which he held that his court could not exercise the common law function of parens patriæ, and therefore had no jurisdiction over the matter, ...", *In re Burrus*, 136 US 586 (1890)

With Judge Betts stating:

"I close this protracted discussion by saying that I deny the writ of *habeas corpus* prayed for because (1) if granted, and a return was made admitting the facts stated in the petition, I should discharge the infant on the ground that this court cannot exercise the common-law function of *parens patriæ*, and has no common-law jurisdiction over the matter ...", *In re Barry*, 42 F. 113 (1844)

Note that the *In re Barry* decision was appended in its entirety to the *In re Burrus* decision.

No other jurisdiction could be found that permitted the state to interfere as *parens patriæ* except Common Law jurisdiction, even taking into account the foreign citizenship of one of the parents, not even equity jurisdiction.

Mercein v. Barry, 25 Wend 64 (1840) is the New York state case that leads to *In re Barry* and *Barry v. Mercein*. In it you find nineteen pages of debate between which Common Law rules should be followed. The Common Law rules which had been in place since time immemorial or the new invention from England, the "Tender Years Doctrine". A new set of rules based on a reinterpretation of the laws of

nature, not judicial discretion. Just new Common Law rules:

> "The **law of nature** has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree. And where no sufficient reasons exist for depriving her of the care and nurture of her child, **it would not be a proper exercise of discretion in any court to violate the law of nature** in this respect" [Emphasis added], *Mercein v. Barry*, 25 Wend 64 (1840)

An equally clear description of this jurisdictional issue can be found in *Cocke v. Hannum*, 39 Miss. 423 (1860)[8]:

> "The legal question presented by the record in this cause must be examined by the light of the decisions of the courts of common law, and not by that of decisions in courts of equity, acting on their claim to jurisdiction over infants as representing the parens patriae. Even courts of equity disclaim any power to deal with the persons of infants or to control their custody, except where they are wards of court or owners of property. The only ground on which courts of equity could assume jurisdiction here would be that the infant was not an orphan and yet owned property, and then only on the ground that the jurisdiction of the Court of Probates in such case to appoint guardians was conferred by statute only, which did not

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[8] And later noting: "There cannot be a tyranny more grievous than that which would be wrought by judges, if allowed to determine the proper custody of a child by running a parallel between the merits of contending parties."

> necessarily affect the jurisdiction in equity. It will lie found that courts of equity have exercised a very liberal discretion on this subject in England, but at the same time it has been admitted that their jurisdiction could only attach on account of the ownership of property by the minor. See Wellesley v. Duke of Beaufort, cited by Talfourd, J., In re Hakeman, 74 Eng. C. L. R. 222."

Best Interest under Common Law jurisdiction never imposed any restrictions on personal liberties[9] nor child support (it could not impose CS because of the point *infra* regarding Statutes 1953, c. 505). Also, Common Law Best Interest was never used to interfere with the natural right to custody. Under Common Law jurisdiction rescuing a child was the only valid implementation of *parens patriæ*. Best Interest under Common Law jurisdiction first had to address the question of natural right (and right of property) and if no one retained a natural right, then and only then could the state act "in the best interest of the child"[10].

Best Interest under Common Law jurisdiction first had to address the question of natural right and if no one retained a natural right, then and only then, could the state act "in the best interest"[11]. "Best Interest" determinations under Common Law jurisdiction were made to rescue a child who lacked a legal guardian not the unbounded imposition of judicial discretion.

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[9] *Hibbette v. Baines*, 78 Miss. 695 (1900) analyzing over 40 cases across the country.

[10] Ibid

[11] Ibid

Also note that in cases such as *Purinton v. Jamrock*, 195 Mass. 187 (1907) and *In re Campbell*, 130 Cal. 380 (1900) before the state could make any "Best Interest" determination it not only had to show that the parent no longer had valid custody rights but that the 'right of property' with regard to the parent-child relationship was also void. This Common Law right of property is not the vulgar concept of possession but a legal concept involving specific protections[12] the state was instituted to guard. The state has failed to address how this right of property, protected under the Fifth Amendment, can be so easily dissolved in civil cases under equity.

Going from criminal and civil punishments for criminal behavior, e.g., abuse, abandonment, or adultery, to judicial discretion based on perception of relative parental abilities is a violation of Due Process. This claim of shifting the burden of proof and burden of persuasion is a violation of Due Process and must be addressed by this Court.

Children, as young as eleven in Massachusetts, under Common Law jurisdiction, could express their preferences to the court regarding custody and under Common law jurisdiction their wishes, see *Commonwealth v. Hammond*, 27 Mass. 274 (1830) and *Curtis v. Curtis*, 71 Mass. 535 (1855), and hence a child's personal liberties were respected by the Court, as long as the choice was of acceptible people or persons[13], i.e., no "Best Interest" determination.

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[12]"Ownership", Oxford Essays in Jurisprudence, A.M. Honore, 1961, 1967.

[13] "... if the infant be of sufficient discretion it will also consult its personal wishes.", *U.S. v. Green*, 26 F. Cas. 30 (3 Mason, 482) (1824).

Thus the state, in misusing the term "Best Interest" under equity jurisdiction, has violated multiple state and federal Constitutional issues. Custody determinations under equity jurisdiction are void and violated Due Process per two of this court's standing precedents by unlawfully adjudicating *parens patriæ* under equity.

Third Questions

Whereas, under Common Law and Criminal jurisdiction, the state needed an underlying criminal act to impose:

1) restraints on personal liberties (to include incarceration),
2) impose the punishment of child support, and
3) impose the punishment of divorce,

now all that is required under equity jurisdiction is a judicial opinion and state police power.

Jail being the state's coercive means in case of failure to comply with a court order now means that intrusions into personal liberties, including incarceration, is ultimately based on judicial discretion, not underlying criminal acts. Criminal punishment based on judicial opinion not proven criminal act is a fundamental violation of the trust between the people and the government. Punishment based on being considered by the state to be the lesser of two parents is Unconstitutional.

Going from punishment for criminal behavior to arbitrary judicial opinion violates Due Process, imposes arbitrary restrictions on personal liberties, imposes punishment without wrongdoing, and a host of other Constitutional violations. What we have now is state ideology backed-up with police power

versus what was originally conceived as a social compact to protect individual rights.

This court has said that civil punishments must have some deterrent and remedial aims, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, (1963) (a seven part test). And also, *United States v. Halper*, 490 U.S. 435, (1989). But the state P&F courts the goal is not civil punishment of the state created, disadvantaged class of "non-custodial parents" but **civil rewards** to those that generate more Title IV-D money for the judiciary (see the discussion of Department of Revenue v. Ryan R., *infra*).

Punishment of innocent people serves no purpose. If divorced parents have a civil dispute over some shared expense for a child a trial by jury is the proper and Constitutional mechanism. Punishment without proven wrongdoing is a violation of the Eighth Amendment and Due Process. Changing the jurisdiction has violated the Ninth and Tenth Amendments.

Fourth Questions

Statutes 1953, c. 505 changed the Common Law rule which prohibited imposing child support or providing necessities to a child without showing some harm to the child, see *Kirby v. Kirby*, 338 Mass 263 (1959). Hence, until 1953, child support, civil or criminal, could only be imposed as a punishment for a criminal act of abuse or abandonment or as a civil punishment for neglect. The Common Law prohibited any type of child support without showing some harm to the child, see *Angel v. McLellan*, 16 Mass. 28 (1819), *Baldwin v. Foster*, 138 Mass. 449 (1885), *Creely v. Creely*, 258 Mass. 460 (1925).

The Petitioner in *Kirby* asked what happened to the Common Law rule, "... that a father who is deprived of the custody of his child by order of court has no common law duty of support."[14] Multiple Massachusetts cases were cited showing this rule's effect in Massachusetts law. The answer from the court was that St.1953, c. 505 changed the Common Law rule requirement of showing harm to impose child support.

Arguably all that Statutes 1953, c. 505 did was allow a civil trial by jury over a civil dispute over necessities for a child between divorced parents. Something that would not have been permitted under the Common Law because of the requirement of showing harm. But imposing the punishment of child support, reserved for the criminal act of abuse, abandonment, or neglect, without a showing of harm would violate the Sixth Amendment; however, a trial by jury would still be permitted.

Hence, until 1953, child support could only be imposed as a punishment for a criminal act of abuse or abandonment or civilly where harm was shown. It is a fundamental violation of Due Process and the Eighth Amendment to impose what is historically a punishment without identified and proven wrongdoing.

The state uses case after case where a father – and only the father since mothers could not be held legally responsible for child support for children born

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[14] *Alvey v. Hartwig, 106 Md. 254* (1907) ("[T]he right of the parent to the services of the children and the obligation of maintenance of the same, devolving upon the parent are reciprocal rights and obligations.")

of a valid marriage – abandons his child and is punished with child support without the right to a trial by jury.

Lest we fail to explicitly show, the Common Law is clearly incorporated into Massachusetts:

> When the Constitution of Massachusetts was adopted in 1780, c. 6, art. 6, provided that "All the laws which have heretofore been adopted, used and approved, in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." *Crocker v. Justices of the Superior Court*, 208 MA 162 (1911)

Also citing *Commonwealth v. Knowlton*, 2 Mass. 530 (1807) ("Our ancestors, when they came into this new world, claimed the common law as their birthright ..."), and also *Sackett v. Sackett*, 25 Mass. 309 (1829) *Commonwealth v. Leach*, 1 Mass. 59 (1804) *Phillips v. Blatchford*, 137 Mass. 510 (1884). Thus the Ninth and Tenth Amendment has been violated in removing this "birthright" of Common Law protections from unwarranted state intrusions into family matters.

Lacking a proximal wrong (i.e., some harm to the child) a trial by jury over 'necessities' was always the case under Common Law jurisdiction[15]. Otherwise

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[15] *Angel v. McLellan*, 16 Mass. 28 (1819); *Foss v. Hartwell*, 168 Mass. 66 (1897) ("There is nothing in the case before us to show any abandonment of the child by the father. ... If the plaintiff chose to receive him, he had no right, without communicating

the shift in the standard of proof and the burden of proof, and imposing punishment without proximal wrongdoing would have violated Due Process, the Sixth, and the Eight Amendment. Additionally, removing the Common Law protections has violated the Ninth and Tenth Amendments.

Fifth Questions

A maximum of law is that you can not be a judge in one's own case[16]. Given that Title IV monies provide an independent revenue stream for the judiciary based on child support 'awards' determined by the judiciary under formula determined by the judiciary, means that the judiciary cannot lawfully adjudicate child support cases.

The judiciary sets the child support formula, adjudicates child support hearings, and is provided an unregulated revenue stream via the Title IV monies based on the child support collections. This violates Article XXIX as well. In the words of *Marbury v. Madison*, 5 US 137 (1803) "It is emphatically the province and duty of the Judicial Department to say what the law is", not to make the laws or derive profit from them.

The case of Department of Revenue v. Ryan R., 62 Mass. App. Ct. 380 (2004) shows a married woman who has an affair, gets pregnant from her lover, which results in a divorce proceeding, where the

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with the defendant, to look to the father for the boy's support."); *Baldwin v. Foster*, 138 Mass. 449 (1885); Kent's Commentaries on American Law, Volume 2, Part IV, Lecture 29, First Edition, specifically, "It [providing necessities to the child] will always be a question for a jury, ...".

[16] *Bonham's Case*, 8 Reporter 115 (1610)

husband has to pay child support even though everyone, including the court, knows he is not the father. (The case misrepresents British common law and ignores MA Statutes from the 1700 and 1800's provided for a trial by jury to challenge legitimacy, see Statutes 1785, Chapter 69; Statutes 1835, Chapter 76, Section 20; Statutes 1860, Chapter 107, Section 27; Statutes 1882, Chapter 146, sect. 23.) The state then goes after the biological father for child support as well. So the crime of adultery is rewarded by the state with custody and two tax-free child support checks[17] for the same child. Collateral damage is an innocent ex-husband who is punished so that additional Title IV monies are funneled to judicial coffers.

Probate and Family courts have devolved into Ecclesiastical Courts by imposing Soviet style dogma[18] over the natural rights, not identifying an injury for the court to act on, and rewarding behavior which increases Title IV remunerations[19].

Probate and Family Court are no longer a court of equity. Blackstone's Commentaries on the Laws of England, Book the Third - Chapter the Third: Of Courts in General:

> "A court is defined to be a place where justice is judicially administered. . . . In every court there

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[17] Isaiah 5:20 - Woe to those who call evil good, and good evil; Who put darkness for light, and light for darkness; Who put bitter for sweet, and sweet for bitter!

[18] "No-Fault Divorce: Born in the Soviet Union?", Journal of Family Law, University of Louisville School of Law, Volume Fourteen 1975 Number One.

[19] *Department of Revenue v. Ryan R.*, 62 Mass. App. Ct. 380 (2004)

must be at least three constituent parts; the *actor, reus* and *judex*; the *actor* or plaintiff who complains of an injury done; the *reus* or defendant, who is called upon to make satisfaction for it; and the *judex* or judicial power which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to be done, to ascertain, and by its officers to apply the remedy."

No injuries are identified for the courts to provide redress. Instead injuries are disregarded in favor of the state ideology, i.e., equity "Best Interest" determinations. The courts have taken on the nature of Admiralty Court in accepting Title IV monies and taken on the nature of an Ecclesiastical Court by imposing Soviet style dogma[20] over the natural rights and rewarding behavior which increases Title IV remunerations.

Regarding the similarities of the Soviet style divorce system and the current rude and foreign equity variant of divorce proceedings in American courts, see "No-Fault Divorce: Born in the Soviet Union?", Journal of Family Law, University of Louisville School of Law, Volume Fourteen 1975 Number One. Also note that dictionaries define any strongly held belief system as a religion.

The recent non-binding referendum on shared parenting in the Commonwealth – the vote was a whopping 85% in favor of shared parenting. But the

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[20] Percentage for child support is exactly the same as in the Soviet Union disregarding the economic differences between a Soviet salary and an American salary, e.g., housing costs and taxes.

judiciary opposes any changes, regardless of such strong public opinion.

Sixth Question

The pattern of Invidious Gender Discrimination spans over a century of change to Family Law.

Under the Common Law of Massachusetts, married men had absolute right to their children[21] while married women had absolutely no right to their children, even when the husband was dead, see *Whipple v. Dow*, 2 Mass. 415 (1807). Unmarried women had absolute right to their children, see *Wright v. Wright*, 2 Mass. 109 (1806) (even if the mother later married the child's Father), and unmarried men had a natural right to their children, which was secondary only to the unmarried mother's rights[22].

Custody was determined according to strict rules of natural right under the Common Law. The rights of custody were reciprocal to obligations[23]. This

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[21] *Ex parte Winn*, 48 Ariz. 529 (1936); *Commonwealth v. Briggs*, 33 Mass. 203 (1834); *State v. Richardson*, 40 N.H. 272 (1860), "It is a well settled doctrine of the common law, that the father is entitled to the custody of his minor children, as against the mother and every body else; that he is bound for their maintenance and nurture, and has the corresponding right to their obedience and their services. 2 Story's Eq., secs. 1343-1350; 2 Kent's Com. 193; 1 Bl. Com. 453; Jenness v. Emerson, 15 N.H. 486; Huntoon v. Hazelton, 20 N.H. 388."

[22] *Reynolds v. Davidow*, 200 Miss. 480 (1946); "The putative father of an illegitimate child is entitled to the custody of the child, as against all persons but the mother; ... *Pote's Appeal*, 51 Am. Rep., 540; Commonwealth v. Anderson, 1 Ash., 55; Richards v. Hodges, 2 Saund., 83; ..."

[23] *Foss v. Hartwell*, 168 MA 66 (1897) "If there is a legal obligation, it must rest upon the ground that he is entitled to

relationship was backed-up with criminal penalties in Massachusetts (unlike in England which only had Elizabethan Poor Laws) if the party failed to uphold their natural law obligation[24].

The only way the state could interfere with Common Law rules for custody under Common Law jurisdiction, even during a divorce proceeding, was to save the child. The Common Law rules were designed to keep the state out of family matters except to rescue the child. No other intrusion into this sacred, natural right to custody was allowed under Common Law jurisdiction except to rescue the child.

The "Tender Years" doctrine provided statutory rights to custody for married women, but not the corresponding responsibilities. Despite the statutory construction of married women's right to custody they were not burdened with the reciprocal, criminal obligations, see *Tornroos v. R. H. White Co.*, 220 Mass. 336 (1915); *Dumain v. Gwynne*, 92 Mass. 270 (1865).

Now under equity the raw data from the SJC's 1989 custody study and Dr. McNabb's study[25] show that the state takes custody of the children more often than Fathers. Thus the claim of Invidious

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the custody, the society, and the services of the child. He must also have the right to determine where his child shall live."
Rotch v. Miles, 2 Conn. 638 (1818) "The court charged the jury, that if they should find, that the defendant deserted his wife and children, ..."

[24] *Tornroos v. R. H. White Co.*, 220 Mass. 336 (1915)

[25] Examining Decision Making in a Family Court: The Reconstruction of Fatherhood by the Legal System, June 1998 by Dr. Joseph W. McNabb

Gender Discrimination regarding the erosion of one gender's natural right to custody is part of a pattern.

Unmarried couple were both punished under Bastardly and Begetting[26] until Statutes 1913, c. 563, when the state made it a misdemeanor for the unwed-father, not for the unwed-mother. Another example of Invidious Gender Discrimination by punishing only one gender for a consensual act requiring two people.

When the state changed the criminal punishment of posting a bond to indemnify the town from expenses associated with the bastard to paying the unmarried women directly it again violated the Common Law by breaking the reciprocal relationship between rights and obligations. This also created a situation where one gender has a reciprocal relationship, i.e., married men, where as the other gender's, i.e., unmarried mother's, obligation was relaxed due to support money received. Another example of gender imbalance in the law, i.e., the alleged pattern of Invidious Gender Discrimination. Unmarried men also had a right to a trial by jury which they have lost, see *Commonwealth v. Clark*, 2 Mass. 156 (1806) ("The statute of March 15, 1786, which gives to the mother of the bastard child this remedy, expressly provides that the party charged be adjudged the putative father, unless the jury find him not guilty.").

All of these losses of rights by men have

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[26] In *Hill v. Wells*, 23 Mass 104 (1828) "In 1692 the provincial legislature, in revising the colonial laws, include provisions in relation to bastardy, in "an act for the punishing of criminal offenders," ... "

corresponded to increased rights for women, regardless of marriage state. The pattern of Invidious Discrimination is clear.

Conclusion:

The imbalance in custody 'awards' are in fact unlawful loss of custody rights. Equity determinations have unconstitutionally separated the Common Law defined obligations from corresponding reciprocal rights, preempted the right to a trial by jury, and inflicted punishments without wrongdoing and hence have no valid remedial justification. The change in jurisdiction violates two standing precedents from this court. The changes made to Family Law have not met the strict scrutiny requirements. Instead the state imposes punishment based on ideology and derives an independent revenue stream.

For the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the validity of the judgments and the proceedings of the state courts including the dismissal from the Massachusetts Supreme Judicial Court issued on 25 February 2009.

Respectfully submitted,

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Westford, MA 01886
978-692-4556
m.cimini@att.net
April 13, 2009

Appendix

Appendix A – Supreme Judicial Court FAR denial
Appendix B – Massachusetts Appeals Court Opinion
Appendix C – Probate and Family Court Opinion
Appendix D – Massachusetts Appeals Court
Rehearing Denial

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724 Telephone 617-557-1020, Fax 617-557-1145

Mark Cimini
12 Maple Road
Westford, MA 01886

RE: Docket No. FAR-174_94

MARK CIMINI
vs.
MARGARET CIMINI

Middlesex Probate & Fam No. 97D4115-DV1
A.C. No. 2007-P-1836

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on February 25, 2009, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: April 2, 2009

To: Mark Cimini
Gerald Venezia, Esquire

Appeals Court of Massachusetts.

Mark K. CIMINI
v.
Margaret R. CIMINI.

No. 07-P-1836.

Dec. 26, 2008.

By the Court
(DUFFLY, KATZMANN & VUONO, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 Mark K. Cimini (father) appeals from judgments entered in the Probate & Family Court on December 29, 2006.FN1 We affirm.

FN1. The father's notice of appeal does not specifically identify the judgments appealed from, but our review of the docket contained in the record (R.A. 10-11) supports the conclusion that the appeal within is from the December 29, 2006, judgments on his April 15, 2004, complaint for modification; his August 3, 2006, complaint for contempt; and the November 8, 2005, complaint for contempt filed by Margaret R. Cimini.

We note that the father has failed to include in his record appendix copies of the complaint for modification, the complaints for contempt, and the judgments on those complaints. He also did not provide us with the transcript of the hearing on these complaints; but he has not challenged the evidence

nor the findings of fact, and the failure thus is not fatal to his claims. Indeed, the sole reference to the facts of the case in the father's brief concerns the claim that his son should have a say in the custody matter. See discussion, *infra*. See also Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975); Mass.R.A.P. 18(a), as amended, 425 Mass. 1602 (1997); *Cameron v. Carelli*, 39 Mass.App.Ct. 81, 83-86, 653 N.E.2d 595 (1995).

The trial judge's memorandum sets forth the procedural history, findings of fact, and conclusions of law. (R.A. 24-34). In his detailed and well-reasoned memorandum, the judge concluded that there has not been a material and substantial change in circumstances that would justify the modification of the 2000 divorce judgment. See G.L. c. 208, § 28; *Rosenthal v. Maney*, 51 Mass.App.Ct. 257, 261-262, 745 N.E.2d 350 (2001). In reaching his decision, the judge considered evidence including the thirteen year old son's expressed preference to reside primarily with the father, correctly noting that this preference was not controlling. See *Bak v. Bak*, 24 Mass.App.Ct. 608, 617, 511 N.E.2d 625 (1987). See also *Custody of Vaughn*, 422 Mass. 590, 599 n. 11, 664 N.E.2d 434 (1996). As to the father's child support obligation, the judge calculated the arrearage based on the father's past failure to pay the amount due and properly concluded that the father's child support obligation could not be reduced where the father refused to provide a financial statement and to answer questions about his income.

On appeal, the father does not challenge the judge's findings of fact. His claims challenge jurisdiction and assert violations of constitutionally

based rights and guarantees, including in particular a claimed right to trial by jury.

Discussion. Statutory enactments, explained by decisional law, combine to govern divorce, child custody, and support matters. See generally G.L. c. 208, § 1 et seq. See also, e.g., *L.W.K. v. E.R.C.*, 432 Mass. 438, 443, 735 N.E.2d 359 (2000). The father's arguments ignore statutory enactments governing the questions raised and decisional law explaining those enactments.

Regarding the father's arguments that we ought to alter the current law, as we said in *Commonwealth v. Dube*, 59 Mass.App.Ct. 476, 485, 796 N.E.2d 859 (2003), "from the very earliest decisions we issued and continuing to this day, we have uniformly and unequivocally held we have no power to alter, overrule or decline to follow the holding of cases the Supreme Judicial Court has decided." See *Commonwealth v. Dominico*, 1 Mass.App.Ct. 693, 710, 306 N.E.2d 835 (1974) (settled practice must be changed by the Supreme Judicial Court or the Legislature); *Gerber v. Worcester*, 1 Mass.App.Ct. 811, 812, 294 N.E.2d 451 (1973) (unless overruled by the Legislature or the Supreme Judicial Court, Appeals Court is bound by existing doctrine).

The father made a claim for a jury trial and argues on appeal that his jury trial right is mandated by art. 15 of the Massachusetts Declaration of Rights. Article 15 "preserves 'the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted' in 1780." *Department of Rev. v. Jarvenpaa*, 404 Mass. 177, 185-186, 534 N.E.2d 286 (1989), quoting from *Opinion of the*

Justices, 237 Mass. 591, 596, 130 N.E. 685 (1921). "[I]n probate and divorce courts there was no such trial [by jury]." *Parker v. Simpson*, 180 Mass. 334, 346, 351, 62 N.E. 401 (1902) (providing historical discussion of jury trial provision in art. 15 and judicial history of colonial and provincial periods). See *Bucknam v. Bucknam*, 176 Mass. 229, 230, 57 N.E. 343 (1900) ("Under the provisions of law prior to the adoption of the Constitution, all cases of marriage, divorce, and alimony were heard by the Governor and Council, and of course without a trial by jury"). See also *Bigelow v. Bigelow*, 120 Mass. 320, 322 (1876) (in separate support action, "the husband has no constitutional right to a trial by jury").

*2 Other claims asserted by the father are rejected as without basis and require no discussion.

Conclusion. It follows from what we have said that the December 29, 2006, judgments on the April 15, 2004, complaint for modification; the November 8, 2005, complaint for contempt; and the August 3, 2006, complaint for contempt are affirmed.

So ordered.

Mass.App.Ct.,2008.
Cimini v. Cimini
73 Mass.App.Ct. 1112, 898 N.E.2d 13 (Table), 2008 WL 5382054 (Mass.App.Ct.)
Unpublished Disposition

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT PROBATE AND FAMILY COURT DEPARTMENT
Middlesex, ss. Docket No. 97D4115

Mark K. Cimini, Plaintiff
vs.
Margaret R. Cimini, Defendant
MEMORANDUM of DECISION

The above-captioned matter came before the court for a trial on the merits of the complaint for modification filed by Mark K. Cimini (hereinafter the plaintiff) on April 15, 2004.

At trial, the plaintiff appeared pro se. Margaret R. Cimini (hereinafter "the defendant") was represented by Gerald Venezia, Esq.

The following witnesses testified at the trial: Steven Chapin, Jonathan Cimini and the plaintiff were called to the stand by the plaintiff. The defendant was called to the stand by her attorney.

After considering the testimony of the witnesses, the documents admitted into evidence, reviewing the post-trial submissions and considering the credibility of the witnesses, this Memorandum of Decision is entered.

The parties to this action were married on March 5, 1993, at Westford, Massachusetts. The marriage was the first for the plaintiff and the second for the defendant.

The parties are the parents of one child: Jonathan [F]. Cimini. Jonathan was born on April 5, 1993. He is 13 years of age.

The defendant filed a complaint for divorce on the

grounds of irretrievable breakdown of the marriage on November 4, 1997.

The parties were divorced by Judgment Nisi (Ginsburg, J.), which entered on January 3, 2000. The judgment incorporated the parties' Separation Agreement, executed the same day, and provided that the Agreement survive the entry of the judgment as an independent contract, with the exception of the provisions of the agreement relating to the child, which provisions merged in the judgment.

The Separation Agreement provides, in pertinent part, that "The Husband shall pay to the Wife for the support and maintenance of the Child the sum of Three Hundred and Twenty Dollars ($365.00) per week (the "obligation"),"[1]

The Separation Agreement further provides, "The Husband and the Wife shall have joint legal custody of the Child with the Child's primary residence to be with the Wife."

The Separation Agreement sets forth a parenting plan which, after February 1, 2000, provided visitation for the plaintiff from Sunday at 10:00 a.m. until Tuesday at 7:30 p.m. and on alternate weekends from Saturday at 10:00 a.m. until Tuesday at 7:30 p.m.

In addition to the schedule set forth above there is a provision "should Father desire an occasional Friday overnight" for advance notice. In addition there are provisions for summers, vacations, and holidays, including four weeks of vacation time in the summer.

The defendant answered the pending modification

complaint, pro se, on April 26, 2004.

On September 22, 2004, the plaintiff filed a Petition for a Writ of Habeas Corpus, wherein he sought an order that Jonathan be placed in his father's custody.

The petition was dismissed by decree which entered on September 23, 2004 (Donnelly, J.).

The plaintiff appealed the dismissal of the petition for writ of habeas corpus on October 22, 2004. On November 24 2004, the Supreme Judicial Court (Ireland, J.) entered a judgment denying the plaintiffs petition to appeal the dismissal of the Petition for Writ of Habeas Corpus. On December 15, 2004, the SJC (Ireland, J.) denied the plaintiffs request for reconsideration.

'The discrepancy is duly noted. The wage assignment which issued on January 3, 2000, was for $365.00, which appears to reflect the agreement of the parties, with the $365.00 being a handwritten change, which is circled.

On January 4, 2005, the plaintiff filed a pleading entitled "Complaint in the Nature of a Petition for Writ of Mandamus and to Invoke the General Superintendence of the Court" in the United States District Court for the District of Massachusetts, naming the defendant, Justice Ireland, and me as defendants.

Hon. William G. Young issued a sua sponte Memorandum and Order directing dismissal of the complaint on January 11, 2005. The plaintiff did not appeal.

On January 20, 2005, the plaintiff removed the

action which was pending in this Court to the United States District Court. On July 18, 2005, Judge Young issued a Memorandum and Order for Remand, returning the complaint to this Court.

On August 9, 2005, the plaintiff filed a Demand for a Trial by Jury. The plaintiff scheduled the Demand for a Trial by Jury for hearing on October 4, 2005. By Memorandum and Order dated October 27,2005, (Donnelly, J.) the demand for a trial by jury was denied on the ground that a jury trial is not available in a domestic relations case such as the pending complaint for modification of the existing custody judgment.

The defendant filed another answer to the modification complaint, through counsel, on November 8, 2005.

. On November 8, 2005, the defendant filed a complaint for contempt. On December 6, 2005 an order entered which consolidated the contempt and the modification complaint.

On February 1, 2006, a pretrial conference was held on the pending complaints. After the conference an order was entered compelling answers to interrogatories within 60 days and that "a current and complete financial statement shall be filed within 60 days." The matter was set down for a status conference on April 26,2006.

The plaintiff filed documents entitled "Jurisdictional Challenge" (dated March 27, 2006), "Jurisdictional Challenge Regarding Child Support" {dated April 29, 2006) and "Jurisdictional Challenge Regarding child Support Amendment" (dated May 4, 2006) and "Jurisdictional Challenge Amendment"

{dated May 24,2006).

On May 5, 2006, the plaintiff filed "Motion for Recusal" and "Motion for Stay of Order and Reconsideration Pending Appeal." Those motions were denied on June 6, 2006.

Custody

1. The plaintiff lives in Westford. He has remarried and has a daughter, [Taisya], who was born on November 26, 2001.

2. The defendant also lives in Westford with her three children: Justin, age 18 and a student at UMass-Amherst, Lindsay, age 16, and Jonathan.

3. The plaintiff testified that he wants Jonathan to have flexibility in his life, and that some of the plaintiffs 40 hour work week can take place at home, giving him a flexible schedule.

4. The plaintiff has been actively involved in Jonathan's extracurricular activities, attending his sports events, supporting his piano lessons (with which the defendant reports she had no involvement) and facilitating Jonathan's involvement with Cub Scouts. In addition the plaintiff testified that he says on top of Jonathan's school work.

5. The plaintiff further testified that the defendant shows no interest in Jonathan's extracurricular activities. According to the plaintiff, Jonathan missed half of his Cub Scout activities because the defendant would not .take him during her parenting time.

6. Jonathan is active in sports (including soccer and basketball) and music. Normally, for his sports he has practice twice per week and one game per

week on Saturday.

7. Jonathan is in the 8th grade. He is a good student, receiving one B and the balance all A's on his report card last year.

8. The plaintiff stopped coaching Jonathan in one of his extracurricular sports, at Jonathan's request.

9. Jonathan is doing well in sports, doing well socially, doing well in music and doing well with family interaction. He is in good health.

10. During the summer of 2006, the plaintiff had additional time with Jonathan at least in part to accommodate wok schedules.

11. Jonathan and Lindsay have teenage spats. Jonathan and Justin get along "pretty good." Jonathan has lived with Justin and Lindsey his entire life.

12. On July 21, 2004, there was an incident involving Jonathan and the defendant's boyfriend's son, Dustin, when Dustin slapped Jonathan. The plaintiff was telephoned by Jonathan and in turn called Westford Police, who responded. No charges were filed.

13. The visitation set forth in the Separation Agreement has been strictly followed. The defendant is unwilling to give Jonathan greater flexibility.

The plaintiff raised, as issues, the following: the defendant showering with Jonathan. This was acknowledged by the defendant as an issue which the Guardian Ad Litem (in the divorce action) addressed and which has not recurred since.

An issue in which a Spanish teacher said

Jonathan was a trouble maker. While the plaintiff addressed the issue, the defendant was unaware of the issue and consequently could not address it.

The defendant's lesser involvement with extracurricular activities. The defendant testified that she attends the events that she can, but that she works two jobs part-time and is a single parent, both of which restrict her available time. She brings Jonathan to school for his 7:00 a.m. music lessons.

Jonathan's exposure to pornography. Apparently his brother, on one occasion, exposed Jonathan to pornography either on line or in a magazine.

Assistance with homework. The plaintiff implies that his superior educational attainment renders him better able to assist Jonathan with his homework. There is no evidence that Jonathan experiences difficulty at school. Additionally, the defendant assists Jonathan to the best of her ability and she has significant artistic ability and an affinity for English literature.

Jonathan's psychologist, Steven Chapin, was called to testify by the plaintiff.

Mr. Chapin first saw Jonathan in January 2001. He has seen Jonathan alone, with his father, with his mother, with Lindsay and with Nina (Mr. Cimini's wife).

Mr. Chapin testified that Jonathan feels caught in the middle of the conflict between his parents.

Jonathan told Mr. Chapin that he would prefer to live with his father, and visit with his mother because he would have greater flexibility going back and forth. In the past, Jonathan has been

uncomfortable with the defendant's home due to tensions with his older siblings.

In the past Jonathan has reported being hit or teased by his siblings.

Of late, Jonathan has reported being much more comfortable in his mother's home with his siblings than in the past and being more comfortable in general as Jonathan's relationship with his siblings has improved.

Mr. Chapin has discussed this issue with the defendant. He reported that she sometimes responds and that sometimes she minimizes the problem.

Mr. Chapin reports that Jonathan wants to protect his mother. Jonathan has also lied to please people.

When meeting with Mr. Chapin, the plaintiff has been cooperative. He expresses significant anger towards the defendant for incidents when Jonathan was 6,7, and 8, and anger about the past. The plaintiffs anger is more contained when Jonathan is present.

Jonathan wants greater flexibility and more time with his friends, most of whom reside closer to the plaintiffs residence than the defendant's residence.

Jonathan tries to please both parents, saying things in therapy that the parent present would like to hear.

Most, if not all, of the most serious issues raised by the plaintiff in the therapy took place when Jonathan was 6 or 7. Because the incidents predated his involvement, Mr. Chapin did not consider filing a 51a.

Jonathan Cimini, at age 13, was subpoenaed to testify at the trial by his father. While the plaintiff stated that the subpoena was necessary because Jonathan was in his mother's custody on that date of trial, his insistence on calling a child of Jonathan's age to testify in litigation between his parents raises serious concerns with the court. I reluctantly permitted Jonathan to testify because he was waiting in the lobby and knew why he was at the Courthouse.

Jonathan testified that he did well in school. He had a problem with his Spanish teacher last year, which his father resolved.

Jonathan testified to tension in his mother's home in the past due to issues with his siblings.

The plaintiff does not strictly enforce the visitation schedule. The defendant strictly enforces the visitation schedule.

Child Support and Arrears

The plaintiffs complaint alleges that, as of April 15, 2004, he was unemployed.

The plaintiff refused to file a financial statement as required by Supplemental Probate Court Rule 401.

On cross examination by the defendant's attorney, the plaintiff refused to answer when asked how much he earned.

Between May, 2004, and January, 2005, the plaintiff failed to make 34 payments of $365.00 per week, resulting in an arrearage of $12,410.00.

When payments resumed in January, 2005, an

additional $91.25 (25% of the underlying order) was garnished from the plaintiffs wages on account of the arrearage. A total of $2,372.50 was paid against the arrears, leaving a balance due of $10,037.50.

The amount of $6,200.00 was levied from the plaintiffs bank account by the Department of Revenue. The defendant has never received that sum from DOR.

Discussion

This Court is authorized by G.L.c.208 §28 to modify a divorce judgment "as to the care and custody of the minor children of the parties provided that the court find that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children."

As set forth in Re; Custody of Kali, 792 NE 2d 635, 439 Mass. 34 (2003), at 840-841, "In custody matters, the touchstone inquiry of what is "best for the child" is firmly rooted in American history, dating back to the Nineteenth Century, [citation omitted]. This legal principle replaced the notion that children were the property of their parents, and instructed courts to view children as individuals with interests independent of their parents, [citation omitted]. The "best interests" standard appeared in our case law at least as early as 1865, in Wardwell v. Wardwell, 91 Mass. 518,9 Alien 518,522 (1865) in which the court held that a judge should not follow a father's wish regarding the guardianship of his son if custody by the proposed guardian would not be in the child's "best interests." It has been adhered to ever since.

The Supreme Judicial Court in Custody of Kali [at

843] held, "If the parenting arrangements in which a child has lived is satisfactory and is reasonably capable of preservation, it is ordinarily in the child's best interests to maintain that arrangement, and contrary to the child's best interests to disrupt it. Stability is itself of enormous benefit to a child, and any unnecessary tampering with the status quo simply increases the risk of harm to the child;"

The Court goes on to hold, at 844, "In most cases, however, if the child has been living with one parent for some time, the child's needs are being adequately met under that parent's care, and that parent is capable of continuing to care for the child, it is not in the child's best interests to disrupt that successful arrangement. Rather, it is in the child's best interests to preserve it. Belief that the other parent might be a little better in some areas ought not suffice to disrupt a child's satisfactory home life with the caretaker parent."

In this case the parties have considerable difficulty with communication. The plaintiff harbors a bitterness and anger towards the defendant for reasons which are unknown to the Court. It is possible that the defendant harbors such feelings for the plaintiff and is merely better able to disguise her feelings.

Communication difficulties and animosity aside, the parties agreed to a parenting plan in 2000. Some seven years later, the plan remains in place and continues to guide Jonathan's schedule.

I note that the plaintiffs proposed judgment requests that his parenting time continue until Wednesday each week, rather than ending on

Tuesday. The balance of the current parenting plan would remain largely as at present under this proposal.

Issues which Jonathan has with his siblings are long standing. Clearly they predate Mr. Chapin's involvement as Jonathan's therapist (which began in 2001). It is reasonable to infer from the prohibition against the siblings acting as care givers contained in the Separation Agreement, that there was an issue prior to the entry of the Judgment Nisi.

I acknowledge Jonathan's testimony that he preferred to maintain his primary residence with his father. At age 13, and with the maturity and state of development of an average 13 year old, his opinion is entitled to consideration. His stated preference is not controlling, however.

The area of concern raised by the plaintiff which is of most significant concern to the Court is the problematic relationship which Jonathan had with his siblings, especially his sister. However, based primarily upon the testimony of Mr. Chapin, a witness called by the plaintiff, I find that the most serious problems occurred prior to Mr. Chapin's involvement began in 2001, and that Jonathan's relationship with his siblings is significantly improved. I find that Jonathan is doing well in school, well in his peer relationships, well in his extracurricular activities and well in his familial relationships.

I find that the parenting arrangement in which the child has lived is satisfactory.

I find that Jonathan has been living with the defendant "for some time" and that Jonathan's needs

are being adequately met.

Accordingly, I conclude that there has not been a material and substantial change of circumstances and that it is not in Jonathan's best interests to disrupt this arrangement.

The plaintiff alleges in several of his pleadings that he was denied the opportunity to present his child support modification in April 2004, by the Register's office. It is unclear to the Court what form the alleged denial of access to the Court took. A review of the file does not reveal an attempt to bring the matter before the Court by motion, nor does it reveal a request for a pretrial conference. Assuming, arguendo, that the plaintiff's access to the Court was frustrated, G.L.c.119A §13 clearly authorizes modification retroactive to the date notice was given.

The issue remains that the plaintiff has quite simply refused to provide a financial statement in violation of Supplemental Rule 401 and a written order from this Court.

Rule 401 authorizes sanctions in accordance with M R Dom Ret Pro 37 for failure to comply with an order to produce a financial statement.

In addition to his refusal to produce and file a financial statement, the plaintiff refused to answer questions about his income posed by the defendant's attorney during cross examination.

The plaintiff's refusal to produce the financial statement and to answer proper questions warrants an order "that the matters regarding which the order was made or any other designated facts shall be taken as established for the purpose of the action in accordance with claim of the party obtaining the

order." M R Dom Rel Pro 37(b)(2)(A),

The plaintiff had the burden of proof on his request to reduce child support. In addition to his refusal to provide financial information[2], he provided no evidence on the subject other than the fact that he was unemployed.

The refusal to file a financial statement or to answer questions regarding income is deemed a waiver of a defense of inability to pay on the defendant's contempt complaint for nonpayment of court ordered child support.

A judgment of dismissal with prejudice shall enter herewith on the modification complaint in accordance with the finding herein that there has not been a change of circumstances and that modification of the current parenting plan is not in Jonathan's best interest.

Appropriate Judgments shall enter on the contempt complaints. The issue of the $6,200.00 which the plaintiff asserts was levied from his bank

[2]I note that income is not the only financial factor to be considered by the Court in an action to modify child support.

Account and which the defendant denies receiving is not addressed in the judgment. That issue must be addressed through administrative process with the Department of Revenue, which is not a party to these actions.

December 29, 2006

Edward F. Donnelly, Jr.
Justice of the Probate and
Family Court

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-P-1836

MARK K. CIMINI
vs.
MARGARET R. CIMINI.

ORDER

The petition for rehearing filed by the appellant having been considered, it is ordered that the said petition be, and the same hereby is, denied.

By the Court (Duffly, Katzmann & Vuono, JJ.),

Clerk [signed Ashley Ahearn]

Entered: January 21, 2009.